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12
13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 SHERI GARAY

Case No. 4:08-cv-01059-SBA

16 Plaintiff,

17 v.

**OPPOSITION TO DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

18 UNUM LIFE INSURANCE COMPANY
19 OF AMERICA; DOES 1-10

Date: July 22, 2008

Time: 1:00 p.m.

Crtrm: 3

20 Defendants.
21 _____ /

Honorable Sandra Brown Armstrong

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I. INTRODUCTION

In filing her complaint against Unum in State Court, Plaintiff Sheri A. Garay sought compensatory relief, including pre-judgment interest, 1) for monthly disability benefits from June 10, 2002 through March 2004; 2) for compensation in the amount of the difference between the lower monthly benefit amount determined by Defendant and the higher monthly benefit amount actually owed to Plaintiff from March 2002 through the present and continuing in the future; and 3) for taxes wrongfully withheld from Plaintiff's benefits. Plaintiff further sought incidental damages, general damages, attorneys fees and costs of suit, and punitive damages.

Unum brought this Motion for Partial Summary Judgment, asking the Court to hold that ERISA preempts Plaintiff's state law claims only thirteen days after serving its initial disclosures on Plaintiff, which consisted of a 2,465 page claims file. (Hopkins Decl. ¶ 1). Unum's initial disclosures did not contain the documents Unum attached to the Declaration of Anne Stein in Support of its Motion for Partial Summary Judgment as Exhibits E through PP. Plaintiff hereby submits an affidavit pursuant to Rule 56(f) and requests that the Court grant limited discovery on the issue of ERISA preemption prior to ruling on Unum's Motion for Partial Summary Judgment. (Hopkins Decl. ¶ 2). Despite the fact that the legislature and the Federal courts characterize ERISA as protective of employee's rights, Plaintiff will lose significant rights to general and punitive damages if the Court holds that ERISA preempts her state law claims at this early stage in the litigation.

II. STATEMENT OF FACTS

Plaintiff Sheri A. Garay was the sole proprietor of Site for Sore Eyes in Berkeley and Antioch California from 1989 through January of 2004. In October of 1995, Ms. Garay contacted an insurance broker named Leon Brilliant, seeking an individual insurance policy. (Garay Decl. ¶ 7). Mr. Brilliant convinced Ms. Garay to enroll in Unum's group long-term disability benefits policy. (Garay Decl. ¶ 7). The policy did not state that it was an ERISA plan nor governed by ERISA. (Stein Decl. ¶ 4, Ex. A). Ms. Garay received Unum's insurance summary plan booklets after she enrolled in the plan and noted that her booklet differed from that of her employees. (Garay Decl. ¶ 8). Ms. Garay

1 understood that her policy was distinct from that of her employees. (Garay Decl. ¶¶ 8, 9). Ms. Garay
 2 thereafter received a ride from Unum for her policy, addressed to “Sheri A. Garay,” confirming the
 3 distinct nature of her policy. (Garay Decl. ¶ 9, Ex. 1). Throughout her ownership of Site for Sore
 4 Eyes, Ms. Garay acted as a mere conduit between her employees and Unum, submitting her
 5 employees’ enrollment forms to Unum and submitting her premiums as well as her employees’
 6 premiums to the company. (Garay Decl. ¶¶ 3, 4, 5, 7).

7
 8 In 2001, Ms. Garay began to struggle with severe symptoms of degenerative spine disease and
 9 eventually applied for long-term disability benefits in June of 2002. (Stein Decl. ¶ 48, Ex. QQ). The
 10 2,465 page claims file produced by Unum in connection with this litigation evidences the
 11 bureaucratic morass which Ms. Garay thereafter struggled to navigate as Unum paid benefits, then
 12 denied benefits and charged overpayments, then approved benefits again, then reduced the amount of
 13 the monthly benefits due and again charged overpayment, erroneously withheld taxes from benefits
 14 due and only partially corrected its error even after numerous requests, informed her that the
 15 California Settlement Agreement applied to her policy, and then changed its mind, and created an
 16 incomprehensible chaos out of what should have been a simply application for and approval of
 17 disability benefits. Devastated by her disability, Ms. Garay sold her business in January of 2004, and,
 18 at that time, all of the employees of Site for Sore Eyes were terminated. (Garay Decl. ¶ 2; Stein
 19 Decl. ¶ 49, Ex. RR) Thus, after January of 2004, Ms. Garay was the only individual whose coverage
 20 continued under the policy issued to Site for Sore Eyes in 1995.

21 22 **III. ARGUMENT**

23 **A. GARAY IS ENTITLED TO A RULE 56(F) ORDER ALLOWING HER TO CONDUCT** 24 **LIMITED DISCOVERY AS TO THE ISSUE OF ERISA PREEMPTION**

25 Federal Rule of Civil Procedure 56(f) provides that “if a party opposing the motion shows by
 26 affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court
 27 may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to
 28 be taken, or other discovery to be undertaken; or (3) issue any other just order.” The declaration of

1 Plaintiff's counsel, Christine Hopkins, puts forth specific reasons why discovery is needed in order
2 for Plaintiff to put forth all the facts essential to justify its opposition. These reasons include
3 counsel's good faith belief that Unum's initial disclosures did not include critical documents relevant
4 to the ERISA preemption issue, including documents and riders addressed to Sheri A. Garay as
5 opposed to Site for Sore Eyes, summary plan documents mailed to Site for Sore Eyes in 1995 and
6 thereafter, and documents in the possession of Unum and/or New Age Optical (the purchaser of Site
7 for Sore Eyes) evidencing the terms of any new policy and any letters documenting the cancellation
8 and/or transfer of Site for Sore Eye's policy at the time the business was sold and, in the alternative,
9 whether New Age Optical's policy falls under ERISA's safe harbor provisions. If Plaintiff's group
10 policy was cancelled after her business closed, then this might equate with conversion. Because
11 Unum only provided premium billing statements through December of 2003, Plaintiff cannot
12 determine if after the sale of her business, the premiums for her coverage changed in a manner
13 consistent with cancellation of the Site for Sore Eyes policy and conversion. (Stein Decl. Exs. E
14 through PP).

18
19 **B. GARAY'S LONG TERM DISABILITY BENEFITS POLICY IS NOT GOVERNED**
20 **BY ERISA IF GARAY ESTABLISHES THROUGH DISCOVERY THAT HER PLAN**
21 **WAS SEPARATE FROM THAT OF HER EMPLOYEES**

22 Plaintiff contends that a separate, independent plan issued to her as opposed to her employees. If
23 Plaintiff can establish this contention through discovery, she will prevail in her opposition to Unum's
24 Motion for Partial Summary Judgment because she will prove her policy was not governed by
25 ERISA. See *Laventure v. Prudential Co. of America*, 237 F.3d 1042 (9th Cir. 2001) ; *In re Watson*,
26 161 F.3d 593, 595 (9th Cir. 1998); *Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir.
27 1999); *Kemp v. Int'l Bus. Mach. Corp.*, 109 F.3d 708 (11th Cir. 1997). Plaintiff's counsel, Christine
28 Hopkins, has submitted the affidavit required under Rule 56(f) stating that it is necessary "to request

1 from Unum all policies and riders referring to Sheri A. Garay and any and all booklets and or letters
2 prepared for the employees of Site for Sore Eyes and any and all booklets prepared for Sheri A.
3 Garay to determine if the documents support a legal claim pursuant to *Laventure v. Prudential Co. of*
4 *America*, 237 F.3d 1042 (9th Cir. 2001).” (Hopkins Decl. ¶ 6). Plaintiff in good faith believes she
5 held a separate policy based on the difference in the booklets issued to her as opposed to her
6 employees. (Garay Decl. ¶ 8, 9 and Ex. 1). Plaintiff also notes that early letters sent to her by Unum
7 referenced her policy number as “0108121 - 0001.” (Garay Decl. ¶¶ 10, 11, Exs. 2, 3). Later letters
8 drop the “-0001” from the policy number. This raises a question as to whether the employees of Site
9 for Sore Eyes had a different policy numbered 0108121 - 0002 or some different number.
10 Additionally, Plaintiff is possession of a rider addressed to “Sheri A. Garay” which was not produced
11 by Unum in its initial disclosures along with Plaintiff’s claims file. (Garay Decl. ¶ 9, Ex.1). This
12 raises the question as to whether other plan documents, riders, booklets, letters, or other documentary
13 evidence exists which applies to Plaintiff’s policy and not the policy of her employees. This rider
14 also raises the question as to whether Plaintiff’s coverage under the group was converted to an
15 individual plan in 1998. *Waks v. Empire Blue Cross/Blue Shield*, 263 F.3d 872, 873-4 (9th Cir.
16 2001)(holding individual policy not covered by ERISA when converted from group policy).

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21 **C. GARAY’S LONG TERM DISABILITY BENEFITS POLICY IS NOT GOVERNED BY**
22 **ERISA BECAUSE SHE DID NOT “ESTABLISH” NOR “MAINTAIN” THE PLAN**

23 Unum argues that Sheri Garay “established” the group long-term disability benefits plan for her
24 the employees. However, Sheri Garay attests that when she approached an insurance broker in 1995
25 to purchase the policy, she specifically sought an individual policy but was convinced to buy a group
26 policy. (Garay Decl. ¶ 7). The policy in question nowhere references ERISA, thus evidencing that
27 neither Sheri Garay nor Unum intended the policy to be covered by ERISA. *Zavora v. Paul Revere*
28

1 *Life Ins. Co.*, 145 F.3d. 1118, 1121 (9th Cir. 1998). An employer does not establish a plan merely by
 2 acting as a conduit for paperwork and premiums to the insurance company: Sheri Garay had no
 3 control nor input into the language of the policy, did not endorse the policy, and did not more than
 4 act as a conduit. (Garay Decl. ¶¶ 3, 4, 5, 7).

6
 7 **D. GARAY’S LONG TERM DISABILITY BENEFITS POLICY IS NOT GOVERNED BY**
 8 **ERISA UNDER THE SAFE HARBOR PROVISIONS**

9 Plaintiff alternatively contends ERISA does not preempt the plan due to ERISA’s safe harbor
 10 provisions. 29 C.F.R. sec. 2510.3-1(j). If the employer satisfies four conditions, the safe harbor
 11 provisions apply and Plaintiff’s state law claims are not governed by ERISA. Those conditions are:

- 12 “(1) No contributions are made by an employer or employee organization;
 13
 14 (2) Participation the program is completely voluntary for employees or members;
 15
 16 (3) The sole functions of the employer or employee organization with respect to the program
 17 are, without endorsing the program, to permit the insurer to publicize the program to
 18 employees or members, to collect premiums through payroll deductions or dues checkoffs
 19 and to remit them to the insurer; and
 20
 21 (4) The employer or employee organization receives no consideration in the form of cash or
 22 otherwise in connection with the program, other than reasonable compensation, excluding
 23 any profit, for administrative services actually rendered in connection with payroll deductions
 or dues checkoffs.” (29 C.F.R. sec. 2510.3-1(j)(1)-(4)).

24 The Failure of an employer to meet the safe harbor conditions, on the other hand, does not
 25 conclusively establish whether or not the plan is governed by ERISA and traditional tests apply.

26 *Stuart v. Unum Life Ins. Co. of America*, 217 F.3d 1145, fn 10 (9th Cir. 2000). Here, Plaintiff presents
 27 evidence she meets three out of the four safe harbor provisions. She did not require her employees to
 28

1 enroll in the plan (as evidenced by the opt out forms in Exhibits E through PP of the Declaration of
 2 Anna Stein and Garay Decl. ¶ 4), she did not endorse or promote the plan (Garay Decl. ¶ 3), and she
 3 did no more than mail Unum enrollment forms and premiums (Garay Decl. ¶ 5).
 4

5 The first safe harbor provision as applied to this case presents a novel question. Plaintiff
 6 deducted from her employees' paychecks the premiums for the life insurance benefits under the same
 7 policy number as the disability benefits policy. Plaintiff no longer has access to her payroll records,
 8 but in good faith states in her declaration that she believes she did not deduct the premiums for the
 9 disability benefits policy from her employee's paychecks due to the terms of the policy. This
 10 evidence demonstrates that Plaintiff, a small business owner, did not want to pay for her employee's
 11 premiums - and did not do so for the life insurance benefits - but only did so for the disability
 12 benefits because it was a term of the disability benefits policy required by Unum, a sophisticated
 13 corporation. Like the finding in *Zavora* regarding the third element of the safe harbor provision,
 14 unique circumstances such as these show that there was no establishment of an ERISA disability
 15 benefits plan by Sheri Garay under the totality of the circumstances from the point of view of a
 16 reasonable person. *Zavora v. Paul Revere Life Ins. Co.*, 145 F.3d 1118, 1120 (9th Cir. 1998).
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20 **E. UNUM CANNOT PREVAIL ON ITS MOTION TO PREEMPT GARAY'S STATE LAW**
 21 **CLAIMS DUE TO PRINCIPLE OF WAIVER AND ESTOPPEL**

22 A defendant waives ERISA preemption as a defense to litigation if not timely raised. *Saks v.*
 23 *Franklin Cover Co.*, 316 F.3d 337, 349 (2nd Cir. 2003)(ERISA preemption is waived if not timely
 24 raised). As evidenced by Exhibits 2 through 22 to Plaintiff's declaration, Unum failed to advise
 25 Plaintiff of her ERISA rights throughout four plus years of handling her disability claim. (Garay
 26 Decl. ¶¶ 10-22). This evidences Unum's bad faith and waiver of its defense of ERISA preemption
 27 because Unum did not assert ERISA during the administrative remedies Plaintiff pursued. *Hangarter*
 28

1 v. *Provident Life And Acc. Ins. Co.*, 373 F.3d 998, 1010-1011, fn7 (9th Cir. 2004)(failure to inform a
2 beneficiary fully about her rights under a policy generally falls below industry customs and norms).

3
4 **F. HOLDING THAT GARAY'S PLAN IS NOT COVERED BY ERISA CREATES NO**
5 **CONFLICT AS THERE NO LONGER IS A SITE FOR SORE EYES, AND**
6 **THEREFORE NO LONGER ANY COVERED EMPLOYEES UNDER THE PLAN NOR**
7 **A PLAN ADMINISTRATOR**

8 Site for Sore Eyes ceased operations in 2004 and all of its employees were terminated pursuant to
9 a new business opening up in its stead. (Stein Decl. Ex. RR). Thus, holding that Sheri Garay's plan is
10 not governed by ERISA is logical as there no longer is any covered employees under the Site for
11 Sore Eyes plan, nor any plan administrator for the Site for Sore Eyes Plan. *Waks v. Empire Blue*
12 *Cross/Blue Shield*, 263 F.3d 872, 876 (9th Cir. 2001).

13
14 **IV. CONCLUSION**

15 The Court should hold that ERISA does not preempt Sheri Garay's policy for disability
16 benefits. Should the Court find that there is a question as to whether ERISA governs the plan, then
17 this Court should grant Plaintiff Sheri Garay the opportunity to conduct discovery pursuant to Rule
18 56(f) due to the incomplete nature of Unum's initial disclosures and the possibility that Plaintiff will
19 obtain additional evidence to support her arguments made herein. Lastly, if the Court grants Unum's
20 motion, Plaintiff should be granted leave to amend her complaint to plead ERISA causes of action,
21 including breach of fiduciary duty which mirrors her complaint for bad faith against Unum in her
22 state law complaint.
23

24
25 DATED: June 27, 2008

LAW OFFICES OF JOHN F. MARTIN
A Professional Corporation

26
27 By: _____/s/

28 CHRISTINE HOPKINS, ESQ.
Attorney for Plaintiff Sheri Garay